pillsbury

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

Lauren Lynch Flick
tel 202.663.8166
lauren.lynch.flick@pillsburylaw.com

April 14, 2014

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: YouMail Petition for Expedited Declaratory Ruling
CG Docket No. 02-278

Dear Ms. Dortch:

This letter relates to the Petition for Expedited Declaratory Ruling ("Petition") filed by YouMail, Inc. ("YouMail") on April 19, 2013, and is specifically to narrow the issues on which YouMail seeks relief. YouMail asks that the Commission issue a decision on the Petition prior to the status conference scheduled for May 14, 2014, in the case of *Gold v. YouMail*,[1] pending before the United States District Court for the Southern District of Indiana.

As more fully explained in the Petition, YouMail provides a software-based voicemail application for smartphone users, which, among many other features, allows YouMail users to automatically send a text message in response to unanswered telephone calls. As these auto-replies have been the source of class action lawsuits pursuant to the Telephone Consumer Protection Act ("TCPA"), the Petition seeks a Declaratory Ruling that YouMail does not violate the TCPA because: (1) it does not use an Automatic Telephone Dialing System ("ATDS"); (2) it is not the "sender" of the auto-reply text messages; and (3) cell phone users expressly consent to receiving a text message in response to their unanswered telephone calls. YouMail also takes

[1] Case No. 1:12-cv-0522-TWP-TAB.

exception to the claim that the auto-replies constitute telemarketing because those auto-replies include a link to the YouMail website.

YouMail recognizes that there are a number of TCPA petitions pending before the Commission that seek a ruling on the definition of ATDS. Accordingly, there are other vehicles through which the Commission can develop a record if it chooses to address the definition of ATDS.[2] Nevertheless, YouMail believes that addressing the remaining positions raised in the Petition will add clarity to the market and possibly slow the flood of TCPA class actions.

First, YouMail asks that the Commission confirm that YouMail need not receive consent directly from the recipient of the auto-reply because the auto-reply is being sent on behalf of a YouMail user. It is the YouMail user, not YouMail, who decides whether an auto-reply will be sent to some or all of its callers as well as the specific content of those auto-replies. As between the calling party and the called party, YouMail acts just as the traditional telecommunications carrier does, that is, by providing facilities and options which the user is free to employ or not. This confirmation would follow directly from the Commission's recent decision in *GroupMe, Inc.,*[3] and it would provide clarity for the many other technology companies who serve as an intermediary between the caller and the called party, including Club Texting and TextMe (which have petitions before the Commission) and Twilio.

As mobile applications continue to evolve and provide consumers with desirable services, an ever greater number of application developers will stand in the intermediary role that has historically been occupied by the carriers. Accordingly, the boundaries of the TCPA must be delineated in connection with this intermediary role so that innovative services can continue to be developed without undue restriction brought on by overly broad interpretations of the TCPA's applicability. In this case, the Commission should confirm that there cannot be any TCPA violation where there is consent to a return communication between the YouMail user and the individual who called that user.

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[2] While YouMail does not seek an immediate decision on the issue of whether it employs an ATDS, should the Commission issue a ruling stating that equipment of the type used by YouMail is not an ATDS, then YouMail cannot be liable for violating the TCPA. YouMail continues to assert that its technology is not an ATDS because it does not have the capacity to store or produce telephone numbers to be called using a random or sequential number generator.

[3] *GroupMe, Inc.*, FCC 14-33 (released March 27, 2014).

Second, the Commission should also confirm that consent to a return communication from a YouMail user may be determined from conduct in the general relationship between the YouMail user and the individual who called that user. YouMail believes that the mere act of calling and/or leaving a voice mail for a YouMail user demonstrates consent to a single return communication, and seeks Commission confirmation of the same. In other words, YouMail believes that an individual who receives a missed call inherently has consent to at least a single return communication to the person who called and/or left the voicemail. This inherent consent to return a telephone call has been fundamental to the development of our modern telecommunications environment. Any interpretation of the TCPA that would require individual users to determine first whether they have been called via a cell phone and then whether they have consent to return the call to that cell phone number, would threaten the near ubiquity of telecommunications service that makes the US the envy of much of the world.

However, even if calling and/or leaving of a voice mail for a YouMail user does not *alone* demonstrate consent to a single return communication, then at least the Commission should confirm that this is a factor that must be considered, along with any other relevant factors such as the nature of the familial, friendship, or business relationship between the YouMail user and the person who called them, when determining whether consent exists. In other words, YouMail asks the Commission to confirm that the act of leaving a voice mail is at least one factor that must be considered, along with the specific nature of the message in the voice mail, the prior communications history between those two persons in calling and/or texting each other, as well as any prior personal or business transactions between those two persons (including but not limited to any written consent given to the YouMail user or any entity with whom the user is affiliated).

YouMail believes that this consent ruling is both common sense and necessary. The ability to return a missed call, even from a wireline phone using the *69 feature, has been around a long time and doing so is part of the ordinary and expected flow of communications between individuals. Moreover, it is an inherent ability of cell phone technology with which other cell phone users are familiar to capture in-bound telephone numbers and allow the call recipient to manually or automatically respond to that inbound call by a return telephone call or text message.

If a smart phone user[4] does not have consent to make a return call or text to another cell phone user without somehow getting express consent in advance, he or she is vulnerable to the allegation that s/he has violated the TCPA by returning any such call (even to friends and relatives). This absurd result is far beyond what Congress intended.[5]

Accordingly, the Commission should clarify that YouMail users have consent to send the auto-reply texts at issue and that YouMail cannot be required to obtain separate consent. Of course, in keeping with the *GroupMe* decision, the Commission should also confirm a text recipient can provide its consent to YouMail directly to receive texts from all YouMail subscribers.

Finally, YouMail asks the Commission to declare that the auto-reply texts are informational, and that the inclusion of a link to the YouMail website address in the auto-reply text is not "telemarketing" for which prior written express consent must be secured. These auto-reply messages are one-time responses directly to the input of a caller trying to reach a YouMail user. The auto-reply messages themselves contain nothing about YouMail. Most of the messages contain links, and the linked content provides those recipients who click through with additional information about the text message they have received. This additional information includes information about the time and date of the caller as well as the message left. The additional information also includes an identification of the nature of the YouMail service, which is consistent with conditions the Commission has placed on the sending of informational texts in recent cases. In general, the Commission has limited senders in other contexts to sending only one text and requiring that the text be brief (160 characters), provide identifying information, provide a means of opting out of receiving additional texts,[6] and in the case of an opt-out confirmation text, that the text be sent in proximity to the time of the opt-out request.[7] The auto-replies at issue here are

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[4] This argument assumes for present purposes that a smart phone could be considered an ATDS. As set forth in YouMail's Petition and the pending petitions of numerous other entities, such an interpretation of "capacity" is contrary to the plain meaning of the statute.

[5] It is also an example of the kind of result that would "inhibit legitimate businesses from offering consumer-friendly applications and services" and "stand in the way of innovation and certainty," as Commissioner O'Rielly noted in his Concurring Statement in the *Cargo Airline Association,* FCC 14-32 (released March 27, 2014) and *GroupMe* Orders.

[6] *See generally, GroupMe, Cargo Airline Association,* and *Soundbite Communications, Inc.,* 27 FCC Rcd 15391 (2012).

[7] *Soundbite* at ¶ 11.

similarly one-time messages sent in proximity to the original caller's call to a YouMail user, and they respond to the standard "STOP" opt-out command. They are brief (and do not even mention YouMail by name), but also provide additional identifying information and opt-out instructions via linked content. All of this is not only consistent with the types of safeguards that the Commission has required in its recent decisions, but it is also standard in the mobile environment, so consumers are accustomed to being able to download an app or learn more about the service via a link in the text itself.

In this respect, YouMail would note that the U.S. District Court for the Southern District of California recently had the opportunity to apply the Commission's *Soundbite* decision to an opt-out confirmation text which included a link to the sender's webpage. The court determined that it was not appropriate to "look through" the contents of the text message itself to what a consumer would find on linked pages. Looking at the contents of the text message itself, the court found that the opt-out message did not constitute telemarketing and did not exceed the bounds of the Commission's *Soundbite* decision.[8] A copy of the decision is attached. Under this standard, it is absolutely clear that the auto-reply texts are not telemarketing.

In conclusion, YouMail requests that the Commission set aside consideration of the ATDS argument originally raised in its Petition. YouMail further requests that the Commission address the remaining arguments raised herein and in its prior submissions in this matter, prior to the May 14, 2014 status conference in *Gold v. YouMail, Inc.*

Please contact the undersigned if you have any questions.

Very truly yours,

/Lauren Lynch Flick

Attachment
cc: Mark Stone (via email)

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[8] *See Holt v. Redbox Automated Retail LLC*, S.D. Cal. No. 3:11-cv-03046 (June 20, 2013).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KATHLEEN HOLT, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. REDBOX AUTOMATED RETAIL, LLC, Defendant.	CASE NO. 11cv3046 DMS (RBB) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** **[Docket No. 42]**

This case comes before the Court on Defendant Redbox Automated Retail, LLC's motion to dismiss. Plaintiff filed an opposition to the motion, and Defendant filed a reply. In the motion, Defendant raises an as-applied challenge to the constitutionality of the Telephone Consumer Protection Act ("TCPA"). After the hearing date on the motion, the United States attempted to file a brief defending the constitutionality of the TCPA. Because of the late filing, the Court struck the United States' brief. After further briefing from all parties, the Court granted the United States permission to file its brief, and gave the parties an opportunity to file a response. The United States thereafter filed its brief, to which the Defendant filed a response. After thoroughly considering the issues, the Court grants Defendant's motion.

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I.

BACKGROUND

Plaintiffs Kathleen Holt and Sebastian Biagioni allege Defendant sent unsolicited text messages to their cellular telephones. (First Am. Compl. ("FAC") ¶¶ 14-35.) Specifically, Plaintiff Holt alleges that on December 14, 2011, she received an unsolicited text message from Defendant. (*Id.* ¶ 14.) The following day, Plaintiff responded to Defendant's text message with a text message that read "STOP." (*Id.* ¶ 15.) In response to that text message, Defendant sent another text message to Plaintiff's phone which forms the basis of this lawsuit. (*Id.* ¶ 16.) It stated:

> You are now unsubscribed from REDBOXALERTS, sorry to see you go. For more info, visit http://ix.ly/727272. Msg&data rates may apply.

Plaintiff Biagioni received a text message from Defendant on December 21, 2012, similar to the one Holt received on December 14, 2011. (*Id.* ¶ 24.) Like Plaintiff Holt, Plaintiff Biagioni responded to Defendant's text message with a text message that read "STOP." (*Id.* ¶ 25.) In response, Defendant sent another text message to Plaintiff Biagioni's phone. (*Id.* ¶ 26.) It stated:

> You are now unsubscribed from Redbox Tickets Text Club and will not receive further messages. For more info, visit http://ix.ly/cs. Msg&data rates may apply.

On December 30, 2011, Plaintiff Holt filed the original Complaint in this case on behalf of herself and all others similarly situated alleging that Defendant's text messages violated the TCPA. In response to the Complaint, Defendant filed a motion to dismiss. While that motion was pending, Defendant requested that the Court stay the case pending the outcome of a proceeding before the Federal Communications Commission ("FCC"). That proceeding involved a central issue in this case, namely, whether a text message like the one at issue here violates the TCPA. After Plaintiff filed a notice of non-opposition to Defendant's request, the Court stayed the case pending a ruling from the FCC.

The FCC issued its ruling on the Petition of SoundBite Communications, Inc. ("*SoundBite*") on November 29, 2012. *See* 27 F.C.C. Rec. 15391. In *SoundBite*, the FCC found that "sending a one-time text message confirming a consumer's request that no further text messages be sent does not violate the Telephone Consumer Protection Act (TCPA) or the Commission's rules as long as the confirmation text has the specific characteristics described in the petition." *Id.* Those characteristics include

"confirmation texts that: 1) merely confirm the consumer's opt-out request and do not include any marketing or promotional information; and 2) are the only additional message sent to the consumer after receipt of the opt-out request." *Id.* at 15394 n.31. The FCC stated that its ruling "applies only when the sender of text messages has obtained prior express consent, as required by the TCPA and Commission rules, from the consumer to be sent text messages using an automatic telephone dialing system or 'autodialer.'" *Id.* at 15391. The FCC concluded that for texts of this type, "a consumer's prior express consent to receive text messages from an entity can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer." *Id.* at 15394.

After this Ruling, the parties filed a joint motion for leave to file a First Amended Complaint. The Court granted that motion, and Plaintiffs Holt and Biagioni filed the First Amended Complaint on January 22, 2013. The present motion followed.

II.

DISCUSSION

Defendant moves to dismiss the First Amended Complaint in its entirety. It argues Plaintiffs have failed to plead sufficient facts to support the element of an automatic telephone dialing system ("ATDS"), and asserts that application of the relevant section of the TCPA to the facts of this case would violate the First Amendment. Defendant also contends its text messages do not violate the TCPA under the FCC's Ruling in *SoundBite*.

A. Motion to Dismiss

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court established a more stringent standard of review for 12(b)(6) motions. To survive a motion to dismiss under this new standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

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"Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this task "by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Id.* at 680. It then considered "the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681.

B. The TCPA

The TCPA provides, in pertinent part:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to make any call (other than a call ... made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ....

47 U.S.C. § 227(b)(1)(A)(iii).

"[T]he three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Associates, LLC,* 707 F.3d 1036, 1043 (9th Cir. 2012), *cert. denied*, 2013 WL 1334909 (U.S. May 13, 2013), (citing 47 U.S.C. § 227(b)(1)). Here, among other arguments, Defendant asserts Plaintiffs must plead whether they gave prior express consent to receive any text messages from Defendant.

The parties dispute whether prior express consent (as opposed to lack of consent) is an element of a TCPA claim and must be alleged. Plaintiffs have refused to allege whether they consented to receiving text messages from Defendant. (*See* FAC ¶¶ 21, 31 (stating Plaintiffs do "not take a position as to the prior express consent of the [earlier text messages.]")) Plaintiffs cite an unpublished Ninth Circuit decision for the proposition that "express consent" is not an element of a TCPA claim, but rather is an affirmative defense for which the defendant bears the burden of proof. *See Grant v. Capital Management Services, L.P.,* No. 11-56200, 2011 WL 3874877, at *1 n.1 (9th Cir. Sept. 2, 2011) (quoting 23 F.C.C. Rec. 559, 565 (Jan. 4, 2008)) ("[W]e conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent."). The Court agrees with that reasoning. The TCPA provides that "[c]alls otherwise in violation of the TCPA are not unlawful if made

'... with the prior express consent of the called party[.]'" *Id.* (quoting 47 U.S.C. § 227(b)(1)(A)). Therefore, the TCPA provides an *exception* to liability, which the defendant must prove. Simply put, if the caller has received prior consent from the called party to contact them, and can prove it, that is a complete defense under the TCPA.

Defendant nevertheless argues that Plaintiffs must plead whether they provided consent to receive the initial text messages sent by Defendant, citing the FCC Ruling in *SoundBite*. However, *SoundBite* did not address pleading requirements under the TCPA. The FCC ruled that sending a one-time text message confirming a consumer's request that no further text messages be sent does not violate the TCPA, as long as the text does not contain marketing or promotional information. While the FCC stated its ruling applies only when the sender of text messages initially had consent from the consumer to be contacted, that limitation simply tracks the requirements of the statute: that calls are not unlawful under the TCPA if made with the prior express consent of the called party.[1] 47 U.S.C. § 227(b)(1)(A). *SoundBite* does not purport to require a plaintiff to plead consent as a basis for TCPA relief; indeed, it is the *absence of consent* that establishes liability under the TCPA. Hence, a plaintiff must allege lack of consent as an element of his or her claim. *Meyer*, 707 F.3d at 1043.

Here, Plaintiffs plead they did not provide consent to Defendant for the *second* text message. (FAC ¶¶ 21, 31.) That is sufficient for pleading lack of consent under the TCPA.

Defendant's real argument is that Plaintiffs have attempted to avoid the reach of *SoundBite* by declining to state in their FAC whether they gave consent to Defendant's initial text message. If Plaintiffs admitted in the FAC they consented to the initial contact, then the second, confirming texts in response to Plaintiffs' opt-out requests would arguably fall squarely within *SoundBite* and would not violate the TCPA. However, whether Plaintiffs initially consented to receiving text messages from Defendant is irrelevant for purposes of determining whether a claim is adequately pleaded under the TCPA. What matters is whether Defendant sent Plaintiffs a text without their prior express consent.

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[1] If a sender of text messages *never* had permission to contact the consumer, then *any* text message – other than a text made for emergency purposes – would be unauthorized by the consumer and proscribed by the TCPA. 47 U.S.C. § 227(b)(1)(A). Accordingly, the FCC's Ruling in *SoundBite* is predicated upon the caller initially having received consent to text the consumer.

Plaintiffs have pleaded that the confirming texts were sent without their permission, and thus they have sufficiently alleged the lack of consent element of their claims.

Whether Plaintiffs have stated a claim, as a matter of law, however, is another matter. On this issue, *Ibey v. Taco Bell Corp.*, No. 12-cv-0583-H (WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012), is instructive. The essential facts in *Ibey* are similar to those in this case, namely that the plaintiff received a text message from the defendant, to which he replied "STOP," and to which the defendant then sent one additional text message confirming the plaintiff's request. While the plaintiff in *Ibey* initially consented to receiving text messages from the defendant, the court found no violation for the confirming text based solely upon its interpretation of the statute: "the TCPA does not impose liability for a single, confirmatory text message." *Id.* at *3. It noted the purpose of the TCPA, which is to "prevent unsolicited automated telemarketing and bulk communications." *Id.* The court further stated that the "'purpose and history of the TCPA indicate that Congress was trying to prohibit use of ATDSs [autodialers] in a manner that would be an invasion of privacy.'" *Id.* (quoting *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)). Based thereon, the court found that "[t]o impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute – prevention of unsolicited telemarketing in a bulk format." *Id.* That reasoning tracks the Ninth Circuit's interpretation of the TCPA as stated in *Satterfield*, and is persuasive. The TCPA does not impose liability for the single, confirmatory text messages alleged here. Plaintiffs have therefore failed to state a claim as a matter of law.

Plaintiffs fare no better under *SoundBite*.[2] That Ruling, in pertinent part, considered the substance of the text and concluded that a single, confirmatory text that does not contain marketing or promotional information does not violate the TCPA. Here, Plaintiffs allege Defendant's confirming texts include forbidden content: marketing and promotional information. Plaintiffs argue the texts referenced a link to Defendant's website and solicited Plaintiffs to visit the website. According to

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[2] The FCC's Ruling in *SoundBite* came down after *Ibey* and addressed the same issue – whether a confirming text violated the TCPA – by analyzing the content of the text as well as the scope of the consumer's consent: a consumer's prior express consent "can be reasonably construed to include consent to receive a final, one-time [confirming] text message" so long as the text does not contain marketing or promotional information. 27 F.C.C.Rec. 15394. Because Plaintiffs decline to allege whether they consented to Defendant's initial text messages, *SoundBite's* holding regarding consent need not be addressed on the present motion.

Plaintiffs, if the consumer clicks on the link it takes the consumer to Defendant's website where Defendant offers deals, movies and games, among other things.

The Court, however, declines to adopt this "look through" approach to liability under the TCPA. Rather, the Court looks to the texts themselves, and the texts at issue in this case do not contain any marketing or promotional information for products or services. Plaintiffs' approach goes beyond what is actually stated in Defendant's confirming texts and invites liability based on what a consumer would find if he or she pursued the link. Because the language of the confirming texts does not contain marketing or promotional information, the texts do not run afoul of *SoundBite* and cannot form the basis for liability under the TCPA. Plaintiffs, therefore, have failed to state a claim as a matter of law.[3]

II.

CONCLUSION AND ORDER

For these reasons, the Court grants Defendant's motion to dismiss. The Clerk of Court shall close the case.

IT IS SO ORDERED.

DATED: June 20, 2013

HON. DANA M. SABRAW
United States District Judge

[3] Because any amendment would be futile, the Court rejects Plaintiffs' request for leave to amend. In light of this holding, the Court declines to address Defendant's other arguments concerning the ATDS and the constitutionality of the TCPA.